Filed 7/28/20 In re Austin H. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re Austin H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. Austin H., Defendant and Appellant.	A158150 (Napa County Super. Ct. No. 20193596602)

Austin H. was declared a ward of the juvenile court and placed on probation after being found vaping and in possession of a knife at school. The sole issue on this appeal is his challenge to the juvenile court's imposition of an electronic search condition. Respondent agrees the condition, as stated, is invalid under *In re Ricardo P.* (2019) 7 Cal.5th 1113 (*Ricardo P.*), which was decided just after the juvenile court proceedings here. Appellant contends the condition should be stricken; respondent maintains the matter should be remanded for the juvenile to consider imposing a more narrowly drawn condition. We will strike the electronic search condition without prejudice to the People seeking to reinstate such a condition consistent with the standards set by *Ricardo P.*

BACKGROUND

On April 10, 2019, then 15-year-old appellant was found vaping in the bathroom of his high school with another student. After being taken to the school office and searched by staff, appellant told the school resource officer he had his " 'feen' (vape)" in one of his pockets and in his other pocket had a knife "for his protection." The knife was approximately three inches long. Asked to write a statement about the incident for the school, appellant wrote " 'Fuk Abud' " on the paper. He was upset about his backpack being searched and said, " 'I might even have bombs in there,' " but when asked if he really had bombs, said he did not. The backpack was searched and no contraband was found.

Asked how he afforded his vaping habit, appellant said he "tells 'nerds' he will sell them marijuana and takes their money but never gives them the marijuana." He also said he used fake $100 bills made by his friend, although he later told the court at the detention hearing that this statement was not true and he had made it up because he was "really mad that day." Appellant told the school resource officer he had had problems with students in the past because he said he was going to rob them; he did not do so, but those students have tried to beat him up and the school does not do anything about it. He was asked if he had reported these incidents and said he had not.

After being arrested and taken to juvenile hall, appellant told the probation officer he was not doing well in school, had problems with a particular group of students, and did not feel safe at school. He denied gang involvement and acknowledged vaping and smoking marijuana.

Appellant's mother told the probation officer she had been " 'fighting with the school' " to protect appellant from other students, as there was a

group harassing and hurting him and he said he was afraid to go to school. She believed he brought the knife to school to protect himself.

School records indicated appellant was "chronically truant, credit deficient, and ha[d] accumulated 21 discipline referrals" in the current school year. He had earned 20 of an attempted 30 class credits in the fall semester and been suspended twice and recommended for expulsion. Behavior referrals had been completed for "defiance/disrespect, noncompliance, truancy, possession of marijuana, possession of tobacco products, and unauthorized cell phone use."

A juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) was filed on April 11, 2019, alleging that appellant possessed a weapon on school grounds in violation of Penal Code section 626.10, subdivision (a). On May 15, 2019, appellant admitted the allegation and the court granted deferred entry of judgment (Welf. & Inst. Code, § 790) with specified terms and conditions, for a period of 12 to 36 months. Upon appellant's objection, and with the acquiescence of the probation officer, the juvenile court struck a proposed electronic search condition requiring appellant to submit to search and seizure of electronic devices within his control, and disclose passwords or other information required for access to such devices and applications, for searches of areas "where evidence likely to reveal criminal activity or probation violations may be found." The court agreed this term was not appropriate absent "some correlation between the use of the phone and the allegations."

On July 15, 2019, the probation officer moved to revoke deferred entry of judgment, alleging appellant violated its terms by being under the influence of THC. It was reported that appellant had failed to appear for a scheduled probation appointment on June 18, and remained out of

communication until July 18, when his stepfather provided a working phone number. On July 6, when a car in which appellant was a passenger was stopped by the police, appellant was found to be impaired by what was believed to be marijuana and in possession of an "air soft gun." He tested positive for marijuana on July 11 and 18. The court revoked deferred entry of judgment and set a disposition hearing.

The probation officer's report for the August 15, 2019 disposition hearing recommended wardship and probation with terms and conditions including the same electronic search condition that had been stricken when the court granted deferred entry of judgment. Appellant objected. The prosecutor argued the condition was appropriate because appellant "was found to be impaired by substances and found in possession of a soft air gun. He's also known to—found using a vape device, and many types of that substance is purchased online, you take photographs with it, and you do a lot of transactions on line." The court declined to strike the condition, stating appellant admitted smoking marijuana frequently and taking money from other students under the false pretense of selling them marijuana and "it's been the court's experience that the manner in which he would—that individuals who are selling marijuana or purporting to sell marijuana would be doing that through a cell phone, and therefore, the court believes that that survives scrutiny under *Lent*." The court adopted the terms and conditions recommended by the probation department, with modifications not relevant to this appeal, and declared appellant a ward of the court.

DISCUSSION

Under the test established in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), which applies to juvenile, as well as adult probation (*Ricardo P., supra,* 7 Cal.5th at p. 1119), " 'a condition of probation which requires or forbids

conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.' " (*Ricardo P.,* at p. 1118, quoting *Lent*, at p. 486.) " 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' " (*Ricardo P.,* at p. 1118, quoting *Lent*, at p. 486.) All three prongs of this test must be satisfied for a probation term to be invalidated. (*Ibid.*)

Ricardo P. held an electronics search condition invalid in a case where there was no indication the minor used an electronic device in connection with his offenses (two counts of burglary) and, because there was no indication he had used or would use electronic devices in connection with drugs or other illegal activity, the condition was not reasonably related to future criminality. (*Ricardo P., supra,* 7 Cal.5th at p. 1116.) The juvenile court had imposed the condition "solely to enable probation officers to monitor whether Ricardo is communicating about drugs or with people associated with drugs." (*Id.* at p. 1119.) Although nothing in the record suggested the minor had ever used electronic devices to "commit, plan, discuss, or even consider unlawful use or possession of drugs or any other criminal activity," the juvenile court noted comments by the minor it took as indicating he was using drugs when he committed the burglaries[1] and imposed the search condition based on the court's own observation that "teenagers 'typically' brag about such drug use on social media." (*Ibid.*) After

[1] The minor had commented that he "wasn't thinking" at the time of his offenses and stopped smoking marijuana after his arrest because it interfered with his ability to think clearly. (*Ricardo P., supra,* 7 Cal.5th at p. 1119.)

expressing some skepticism about the juvenile court's inference of drug use and generalization about teenagers' online boasting, the Supreme Court held that even accepting those premises, the electronics search condition was invalid because "the burden it imposes on Ricardo's privacy is substantially disproportionate to the condition's goal of monitoring and deterring drug use." (*Id.* at p. 1120.)

Under the guidelines set by the *Ricardo P.* opinion, for a probation condition to be upheld as reasonably related to future criminality under the third prong of the *Lent* test, there must be "information in the record establishing a connection between the search condition and the probationer's criminal conduct or personal history—an actual connection apparent in the evidence, not one that is just abstract or hypothetical." (*In re Alonzo M.* (2019) 40 Cal.App.5th 156, 166 (*Alonzo M.*), review denied Dec. 18, 2019; *Ricardo P., supra,* 7 Cal.5th at pp. 1120–1121.) There need not be a "nexus between the search condition and the minor's underlying offense" and " '[c]ourts may properly base probation conditions upon information in a probation report that raises concerns about future criminality unrelated to' past criminal conduct." (*Alonzo M.,* at p. 166, quoting *Ricardo P.,* at p. 1122.) But " 'the burden imposed by [the] probation condition' must be proportionate to 'the legitimate interests served by the condition.' " (*Ibid.*) " ' "[A] condition of probation that enables a probation officer to supervise his or her charges effectively is . . . '*reasonably* related to future criminality,' " ' only if its infringement on the probationer's liberty is not 'substantially disproportionate to the ends of reformation and rehabilitation.' " (*Ibid.,* quoting *Ricardo P.,* at p. 1126.)

In *Alonzo M., supra,* 40 Cal.App.5th at pages 166–167, an uncontested probation condition required the minor to stay away from the individuals

with whom he had been arrested and others disapproved of by his parents or the probation officer. The *Alonzo M.* court held that an electronic search condition could properly be imposed for the juvenile court's stated purpose of addressing concern with the minor's admitted susceptibility to negative peer influences, but struck the condition as imposed because its terms were not limited to monitoring his social contacts, instead allowing searches of "any medium of communication reasonably likely to reveal whether you're complying with the terms of your probation." (*Alonzo M.,* at pp. 163, 166–167.) Holding that the condition "burden[ed] Alonzo's privacy in a manner substantially disproportionate to the probation department's legitimate interest in monitoring Alonzo's compliance with the stay-away orders," *Alonzo M.* remanded for the juvenile court to consider imposing an electronic search condition more narrowly tailored to searches of communications reasonably likely to reveal whether the minor was associating with prohibited persons. (*Id.* at p. 168.)

Similarly, in *In re Amber K.* (2020) 45 Cal.App.5th 559, 561 (*Amber K.*), this court held an electronic search condition would be appropriate to monitor compliance with the juvenile court's order to stay away from the person the minor had assaulted, but the condition as imposed—requiring submission of electronic devices to searches of "any medium of communication reasonably likely to reveal whether she is complying with the terms of her probation"—was impermissible under *Ricardo P.* (*Amber K.,* at pp. 561, 567–568.) We struck the condition and remanded for the trial court to consider whether to impose a revised electronic search condition. (*Id.* at p. 568.)

Respondent concedes the electronics search condition in the present case is unreasonable under *Ricardo P.* As in *Ricardo P.*, there was no evidence that appellant used electronic devices in connection with any

unlawful conduct. The juvenile court imposed the condition because appellant had admitted taking money from other students on the pretense of selling them marijuana and "it's been the court's experience" that "individuals who are selling marijuana or purporting to sell marijuana would be doing that through a cell phone." As respondent recognizes, this justification is akin to the generalization about "typical" behavior that *Ricardo P.* rejected as a basis for the condition in that case.

Respondent argues, however, that a more narrowly drawn electronics search condition would be appropriate based on the evidence that appellant had in the past been disciplined at school for unauthorized use of a cell phone. The evidentiary basis for this argument is a statement in the probation officer's report that, in addition to suspensions from school, a recommendation for expulsion and 21 discipline referrals, "[b]ehavior referrals have been completed for defiance/disrespect, noncompliance, truancy, possession of marijuana, possession of tobacco products, and unauthorized cell phone use." Respondent maintains that because compliance with school rules is a condition of appellant's probation, a condition authorizing probation officers to search appellant's electronic devices in order to determine his "compliance with such rules, or other legitimate rehabilitative interests" would be reasonable.[2]

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[2] Appellant argues that respondent's proposed justification is illogical because appellant is no longer in school, having been placed on home detention with an independent study agreement, so there is no need to monitor his compliance with school rules. But this was not the case by the time the court imposed the electronic search condition at the disposition hearing: At the conclusion of the disposition hearing, the court asked appellant, "Did you start school today?" Appellant responded, "[y]eah," and his mother told the court, "[w]e have to sign the papers still. They switched him from independent studies." And even when appellant was on

Respondent's rationale is little better than the juvenile court's rationale. Respondent's reference to "other legitimate rehabilitative interests" is the sort of generalized supervisory rationale *Ricardo P.* rejected in disagreeing with the view that "any search condition facilitating supervision of probationers is 'reasonably related to future criminality.' " (*Ricardo P., supra,* 7 Cal.5th at p. 1125.) This broad justification, the Supreme Court held, "would effectively eliminate the reasonableness requirement in *Lent*'s third prong, for almost any condition can be described as 'enhancing the effective supervision of a probationer.' " (*Ricardo P.,* at p. 1127.) *Ricardo P.* held that a probation condition justified as enhancing effective supervision must not infringe on the probationer's liberty to an extent "substantially disproportionate to the ends of reformation and rehabilitation." (*Ibid.*; *Alonzo M., supra,* 40 Cal.App.5th at p. 166.)

Ricardo P. emphasized the intrusion into privacy of a broad electronic search condition, noting, for example, the " 'immense storage capacity' " that allows cell phone users to " 'keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.' " (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1123, quoting *Riley v. California* (2014) 573 U.S. 373, 395.) Limiting the search to areas where evidence likely to reveal criminal activity or probation violations may be found, as the court did here, is hardly a limitation. (See *People v. Appleton* (2016) 245 Cal.App.4th 717, 725 [electronic search limited to " 'material prohibited by law' " posed no limit absent evidence of any technology that would allow a forensic technician to determine whether a computer file or document contains unlawful material

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independent study, the court contemplated him having some connection to school, as it cautioned him that to the extent he was "on campus for independent study" he was required to "obey all the school regulations."

without first examining its contents].) Given the "constant and pervasive use of electronic devices and social media by juveniles today," without a proportionality requirement, "[i]n virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct." (*Ricardo P.*, at p. 1123.) The juvenile court may not authorize electronic searches "for the broader purpose of insuring that [the minor] was complying with all the probation conditions." (*Amber K., supra,* 45 Cal.App.5th at p. 567; *People v. Bryant* (2019) 42 Cal.App.5th 839, 846, review granted Feb. 19, 2020, S259956 [rejecting trial court's reasoning that electronic search condition could aid monitoring of other terms of probation].)

The only specific justification respondent suggests for the search condition, as indicated above, is monitoring appellant's compliance with school rules due to his reported "behavior referral" for unauthorized use of a cell phone at school. This attempt to find a connection between the electronic search condition and appellant's "criminal conduct or personal history" (*Ricardo P., supra,* 7 Cal.5th at pp. 1120–1121) is very weak. The record provides no information as to the nature of appellant's "unauthorized use" of a cell phone, but it is difficult to see how it would justify a search of the *content* of appellant's electronic devices. If the issue was using a cell phone during the school day contrary to school rules, compliance could be monitored by searching for the times calls or texts were sent and received, or applications accessed. In *Alonzo M.,* the case respondent relies upon, the record showed that the minor spent "a significant amount of his time using electronic devices," so that a properly drawn electronic search condition was a reasonable means of monitoring compliance with the court's "reasoned, evidence-based finding that [the minor's] successful rehabilitation depends on

avoiding negative social influences." (*Alonzo M., supra,* 40 Cal.App.5th at p. 166.) Here, the record contains no evidence concerning appellant's use of electronic devices aside from the reference to unauthorized use at school and no evidence-based justification for the electronic search condition. Indeed, the juvenile court's stated reason for imposing the condition was based on circumstances that existed when it *refused* to impose the same condition at the time it granted appellant deferred entry of judgment.

Ricardo P. makes clear "that 'requiring a probationer to surrender electronic devices and passwords to search at any time is . . . burdensome and intrusive, and requires a correspondingly substantial and particularized justification.' " (*People v. Cota* (2020) 45 Cal.App.5th 786, 791, review denied May 13, 2020, S261543, quoting *Ricardo P., supra*, 7 Cal.5th at p. 1126.) An "abstract or hypothetical relationship between the probation condition and preventing future criminality" is not enough (*Ricardo P.,* at p. 1121); "to justify a burdensome condition, there must be a specific relationship—grounded in the facts of the case—between the condition and preventing future criminality." (*Cota*, at p. 790.) Respondent does not explain how the intrusiveness and burden of an electronic search condition could be proportionate to the interest of monitoring compliance with school rules on cell phone use.

As respondent concedes, the electronic search condition imposed by the juvenile court must be stricken as invalid under *Ricardo P.* and *Lent*.[3] Respondent has neither suggested an adequate justification for imposing an electronic search condition in the present case nor proposed wording that

[3] Given this conclusion, we need not reach appellant's arguments that the condition imposed by the juvenile court is constitutionally vague and overbroad.

would ensure the burden of such a condition bears "a degree of proportionality" to "legitimate interests served by the condition." (*Ricardo P., supra,* 7 Cal.5th at p. 1122.) We will not, however, foreclose the possibility that facts not reflected in the current record might support a narrower electronics search condition. (*People v. Cota, supra,* 45 Cal.App.5th at p. 791.) We will strike the electronics search condition without prejudice to the People seeking to demonstrate to the juvenile court that a narrower electronics search condition serves the interests of justice and reformation and rehabilitation of the minor (see Welf. & Inst. Code, § 730) and is proportionate to the burden on appellant's privacy.

DISPOSITION

The electronics search condition is stricken without prejudice to the People seeking to reinstate such a condition on a factual showing satisfying the standards of *Ricardo P.* In all other respects, the disposition order is affirmed. The matter is remanded for proceedings consistent with this opinion.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

In re Austin H. (A158150)